LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 23 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	9
ARGUMENT:	
I. On the Undisputed Facts the Confession Was Not Voluntary	11
II. The Issue of Voluntariness Was Never Determined Below in Accordance With the Standards Laid Down by This Court	18
III. The Rule Employed Below That the Confession Was Presumed to Be Voluntary and That the Burden Was on the Defendant to Show That the Confession Was Not Voluntarily Made Violates Due Process of Law Under the Fourteenth Amendment	23
IV. The Failure of the Trial Court to Submit to the Jury the Issue of the Voluntariness of the Confession Violates Due Process of Law Under the Fourteenth Amendment	28
Conclusion	34
ADDENDUM (Survey of State Cases on Burden of Proof)	37

CITATIONS

CASES:	Page
Ashcraft v. *Tennessee*, 322 U.S. 143	11
Beecher v. *Alabama*, —— U.S. —— (10/23/67), *per curiam*	24
Blackburn v. *Alabama*, 361 U.S. 199	12, 16, 17
Bram v. *United States*, 168 U.S. 532	17, 24, 27
Brown v. *Mississippi*, 297 U.S. 278	17
Carnley v. *Cochran*, 369 U.S. 506	34
Clewis v. *Texas*, —— U.S. —— (4/24/67)	16, 17, 19
Clifton v. *United States*, 371 F.2d 554 (D.C. Cir., 1966), *cert. denied*, 386 U.S. 995 (1966)	27, 30
Commonwealth v. *Beaulieu*, 333 Mass. 640 (1956)	8
Commonwealth v. *Lucas*, 332 Mass. 594 (1955)	14
Commonwealth v. *McGarty*, 323 Mass. 435 (1948)	8
Commonwealth v. *Sheppard*, 313 Mass. 590 (1943)	8
Creech v. *Commonwealth*, 412 S.W.2d 245 (Ky. 1967)	35
Crooker v. *California*, 357 U.S. 433	19
Culombe v. *Connecticut*, 367 U.S. 568	15
Davis v. *North Carolina*, 384 U.S. 737	12, 16, 19, 20
Escobedo v. *Illinois*, 378 U.S. 478	19
Fikes v. *Alabama*, 352 U.S. 191	12, 16
Gallegos v. *Colorado*, 370 U.S. 49	12
Gibson v. *United States*, 363 F.2d 146 (5th Cir., 1966)	35
Gilbert v. *California*, —— U.S. —— (6/12/67)	12
Groban, In re, 352 U.S. 330	19
Haley v. *Ohio*, 332 U.S. 596	17
Harrold v. *Territory of Oklahoma*, 169 Fed. 47 (8th Cir., 1909)	27
Haynes v. *Washington*, 373 U.S. 503	16, 21
Hubbard v. *Tinsley*, 336 F.2d 854 (10th Cir., 1964)	26

Page

Jackson v. *Denno*, 378 U.S. 368 .....24, 28, 29, 30, 31, 35
Jenkins v. *State*, 230 A.2d 262 (Del. 1967) 35
Johnson v. *New Jersey*, 384 U.S. 719 .....19, 20, 35
Johnson v. *Zerbst*, 304 U.S. 458 34
Jones v. *Commonwealth*, 332 Mass. 491 (1951) 31

Lynum v. *Illinois*, 372 U.S. 528 35
Lyons v. *Oklahoma*, 322 U.S. 596 (1944) 23

Malloy v. *Hogan*, 378 U.S. 1 .....23, 24, 25
Maxwell v. *Stephens*, 348 F.2d 325 (8th Cir., 1965), *cert. denied*, 382 U.S. 944, *rehearing denied*, 382 U.S. 1000 26
Miranda v. *Arizona*, 384 U.S. 436 .....12, 14, 15, 19, 24, 26, 34, 35
Morrison v. *California*, 291 U.S. 82 26

Payne v. *Arkansas*, 356 U.S. 560 ..... 16, 35
People v. *Doherty*, 59 Cal. Rptr. 857, 429 P.2d 177 (1967) 35
People v. *Jackson*, 60 Cal. Rptr. 248, 429 P.2d 600 (1967) 35
People v. *LaBelle*, 53 Misc.2d 111, 277 N.Y.S.2d 847 (Co. Ct. 1967) 35
Pinto v. *Pierce*, —— U.S. —— (10/23/67), *per curiam* 30, 31

Reck v. *Pate*, 367 U.S. 433 .....12, 16, 21
Rogers v. *Richmond*, 365 U.S. 534 ..... 20, 22

Simmons v. *Bomar*, 349 F.2d 365 (6th Cir., 1965), *per curiam* 26
Sims v. *Georgia*, —— U.S. —— (1/23/67) 29
Spano v. *New York*, 360 U.S. 315 .....16, 17, 35
Speiser v. *Randall*, 357 U.S. 513 ..... 25, 26
State v. *Brock*, 100 Ariz. 168, 416 P.2d 601 (1966) 35
State v. *Ruiz*, 49 Haw. 504, 421 P.2d 305 (1966) .35
State v. *Shoffner*, 31 Wis.2d 412, 143 N.W.2d 458 (1966) 35
State v. *Vigliano*, 50 N.J. 51, 232 A.2d 129 (1967) 35

Page

State v. *Worley*, 227 N.E.2d 746 (Ill. 1967) 35
Stevenson v. *Boles*, 331 F.2d 939 (4th Cir., 1964), *affirmed per curiam*, 379 U.S. 43 30

Tehan v. *United States ex rel. Shott*, 382 U.S. 406 25
Thomas v. *Arizona*, 356 U.S. 390 21
Tot v. *United States*, 319 U.S. 463 ..... 25, 27
Townsend v. *Sain*, 372 U.S. 293 12
Turner v. *Pennsylvania*, 338 U.S. 62 ..... 16, 21

United States v. *Inman*, 352 F.2d 954 (4th Cir., 1965) 27, 30, 33
United States v. *Pinto*, 259 F.Supp. 729 (D.N.J. 1966), *aff'd per curiam*, 374 F.2d 472 (3rd Cir. 1967) 35
United States v. *Wade*, —— U.S. —— (6/12/67) 12, 19

Wan v. *United States*, 266 U.S. 1 ..... 24, 25
Ward v. *Texas*, 316 U.S. 547 16
Watts v. *Indiana*, 338 U.S. 49 16

CONSTITUTIONS:

Constitution of United States:

Amendment V 2
Amendment VI 2
Amendment XIV 3

Constitution of Massachusetts:

Article XII 31

Page

STATUTES:

Massachusetts General Laws:

Chapter 123, § 100A 15

Chapter 278, § 33A 16

Chapter 278, § 33C 1

Chapter 278, § 33E 1

MISCELLANEOUS:

Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938 (November, 1965) 15, 26

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at Mass. Adv. Sh. (1967) 581 (225 N.E. 2d 360) and appears in the Appendix, A. 335-343.[1] The

---

[1] "A." refers to the Appendix; "Tr." refers to the typewritten "Transcript of the Evidence" (See Mass. G. L. c. 278 § 33C); "N. Tr." refers to the typewritten transcript of "Hearing on Motion for New Trial." "R." refers to the "Summary of Record and Assignment of Errors," which is a printed record as provided by Mass. G. L. c. 278, §§ 33C, 33E.

Findings, Rulings and Order of the Superior Court of Suffolk County, Massachusetts, on Petitioner's Motion for New Trial is set forth in the Appendix, A. 325-330.

Jurisdiction

The Order and Rescript of the Supreme Judicial Court of Massachusetts was entered on April 4, 1967 (A. 334). The order granting the motion for leave to proceed *in forma pauperis* and granting the petition for a writ of certiorari was granted on October 9, 1967. The jurisdiction of this Court is invoked under 28 USC 1257(3).

Constitutional Provisions Involved

The questions here presented involve principles of due process of law under the Fourteenth Amendment to the Constitution of the United States, in relation to the privilege against self-incrimination under the Fifth Amendment and the right to trial by jury under the Sixth Amendment.

Amendment V

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

Amendment XIV

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

(1) Whether Petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession which in the "totality of the circumstances" was not voluntary?

(2) Whether Petitioner's Fourteenth Amendment rights were violated by the failure of the Massachusetts courts to apply standards established by this Court in determining the voluntariness of Petitioner's confession?

(3) Whether Petitioner's Fourteenth Amendment rights were violated because the Massachusetts courts imposed on Petitioner the burden of proof on the issue of the voluntariness of his confession?

(4) Whether Petitioner's Fourteenth Amendment rights were violated by the failure of the Trial Judge to submit to the Jury the issue of the voluntariness of Petitioner's confession?

Statement of the Case

The Petitioner, Ronald L. Johnson, was tried, together with one Graves, before Murray J.[2] and a Jury in the Suffolk Superior Court, beginning on January 13, 1964, on six indictments, respectively charging him and Graves with murder in the first degree (A. 12), charging him with armed robbery while masked and Graves with armed robbery (A. 13-14), charging him with unlawfully carrying a firearm (A. 15), charging him and Graves with conspiracy to commit armed robbery (Tr. 41-42), charging him and Graves with unlawfully carrying a revolver in a vehicle (A. 16-17), and charging him and Graves with assault and battery by means of a dangerous weapon (A. 18).

At the close of the evidence the trial judge directed verdicts of not guilty for both defendants on the conspiracy indictment and directed a verdict of not guilty for Graves on the indictment for carrying a revolver in a motor vehicle (Tr. 1443-1444).

The Jury on January 25, 1964 returned verdicts of guilty as to both defendants on all of the remaining indictments, with a recommendation that the death penalty not be imposed as to Graves (Tr. 1439-1442).

Thereafter on the indictment for murder Johnson was sentenced to be electrocuted (A. 239) and on the remaining indictments was sentenced to serve concurrent prison terms of varying length (R. 38, 46, 54, 62).

Testimony of witnesses at the trial was to the effect that, on the evening of August 1, 1963, Johnson, wearing a mask

---

[2] Now a Judge of the United States District Court for the District of Massachusetts.

and armed with a revolver, held up the Copley Wine & Liquor Company in Boston, Massachusetts (Tr. 193-206); that upon leaving the store he was pursued by Officer O'Leary and others (Tr. 207-217, 403, 457); that Johnson entered an automobile on Commonwealth Avenue and as Officer O'Leary approached the automobile, he was shot twice and mortally wounded (Tr. 359-360, 459-460, 508 et seq.); and that Johnson drove off in the car but was pursued by the police and ultimately apprehended after the car driven by him came into collision with a bus (Tr. 459-461, 586-594).

After his apprehension Johnson was taken by police to Division 10 where he was booked at 9:35 P.M. (A. 325-326). He was thereafter taken to police headquarters (A. 326). He was placed in several police lineups between approximately midnight and 4:00 A.M. on August 2, and various witnesses who observed Johnson testified at the trial that he was bleeding on and around the head as he was in the lineups (A. 28-30, 36-38, 41-46, 48-51, 60-61, 326).

In these lineups, and elsewhere, he was repeatedly confronted by Lt. John J. Donovan of the Boston Police Department with statements of persons identifying him and asked if he had any response (A. 288-294, 302-310, 320-321). At about 5:50 A.M. on August 2, after the last such lineup and in response to the inquiry of Lt. Donovan, Johnson gave a question and answer statement amounting to a confession to Lt. Donovan at Boston police headquarters, which was recorded by a police stenographer (A. 191-201, 329). Johnson first saw a lawyer about three hours after his confession (A. 242-243).

Johnson's confession was admitted into evidence at his trial over his objection that the confession was involun-

tarily given because it was coerced from him by physical force applied by the police (A. 188 et seq.). He testified at a *voir dire* hearing held before the Trial Judge (A. 96 et seq.) that he was severely beaten by various police officers (A. 109 et seq.); various police officers testified that Johnson was not beaten (A. 170 et seq.). Dr. Lawrence M. Robertson, Jr. testified that on August 17, 1963 he operated on Johnson at Boston City Hospital for a subdural hematoma, which is a collection of blood between the dura and the brain which could have been there for one to two weeks (A. 166-170).

At the close of the *voir dire* hearing the Trial Judge ruled "I am not satisfied from the evidence that it was not freely and competently given, and, therefore, I rule that it is admissible."

Thereafter, over objection, the confession was read into evidence and exception taken thereto (A. 190-201). It affirmatively appeared at the trial that Johnson was not advised at the time of his confession of his right to be silent or that what he said might be used against him or of any right to counsel and there was no evidence that he was so cautioned or advised at any other time. It affirmatively appeared at the trial that the only person present at the time of confession were policemen and the police stenographer. The Trial Judge's charge to the Jury included no reference whatsoever to the question of the voluntariness of Johnson's confession (A. 207-239). (No request was made to charge on this issue and no exception was taken to the charge.) The Jury found Johnson guilty and he was sentenced to death (A. 261).

On October 1, 1964 present counsel for Johnson[3] filed a Motion for a New Trial based on the admission into evidence of Johnson's confession to Lt. Donovan (A. 240). Further evidence was taken as to the circumstances of Johnson's arrest and subsequent events leading up to his confession (A. 244-285).

In his Findings, Rulings and Order on the Motion for New Trial (A. 325-330) the Trial Judge found (A. 329):

> "No police officer told the defendant at any time, from the time he was taken into custody at the rear of 20 Fenwood Road until he completed his statement to Lieutenant Donovan, that he had 'the right' to remain silent, or 'the right' to refuse to answer any questions put to him by the police, or that anything he said to the police might or could be 'used against him'. During the lineup, the defendant heard several persons identify him as the man involved in the shooting on Commonwealth Avenue. He asked certain questions challenging the accuracy or credibility of the identification by some, without effecting any change by the identifying witnesses. After the last of the four lineups, he said to Lieutenant Donovan, in response to the latter's inquiry, that he would talk to him. At that time the defendant had become, together with Herbert Graves, the prime suspect in the felonious homicide of Officer James B. O'Leary. I find that his willingness to talk to Lieutenant Donovan at this time was not a waiver of any 'right' he had to remain silent and to

[3] On May 29, 1964 Johnson complained to the Chief Justice of the Superior Court of his assigned counsel's conduct of his defense at trial. On June 16, 1964 present counsel was assigned by the Trial Judge to represent Johnson in further proceedings (A. 7).

refuse to talk to the police at that time or to be cautioned by the police at that time of such 'rights', if it should be determined that in the circumstances he had any one or all of such 'rights'. Whatever his declarations were at other times concerning his rights *vis a vis* the police, I am not satisfied that he knew what his rights were at the time of the interrogation."

The Trial Judge also found that Johnson did not, as he testified, ask for counsel, and denied the Motion for New Trial (A. 330).

On appeal to the Supreme Judicial Court Johnson assigned as errors, among other things, the admission of his statement over objection (Assignment No. 7, A. 332), the denial of his Motion for New Trial based on the admission of the statement (Assignment No. 12, A. 333) and the failure to instruct the Jury on the issue of voluntariness with the related question of the burden of proof on the issue of the voluntariness of Johnson's confession (Assignment No. 13, A. 333).

The Supreme Judicial Court of Massachusetts affirmed the Judgment of the Superior Court (A. 335) stating *inter alia*:

* * * * *

"When the statement was sought to be introduced at trial, it was prima facie voluntary. *Commonwealth* v. *McGarty,* 323 Mass. 435, 438. *Commonwealth* v. *Beaulieu,* 333 Mass. 640, 655. The burden was on the defendant to show that the statement was not voluntarily made." *Commonwealth* v. *Sheppard,* 313 Mass. 590, 604. (A. 337)

* * * * *

"Although the judge may pass upon the voluntariness of a statement in the first instance, the final determination is one of fact for the jury." (A. 338)

* * * * *

"No evidence was presented to the jury from which they could find that the statement was involuntarily made." (A. 338)

* * * * *

"The defendant's second argument is that the judge failed to consider important factors on the question of voluntariness which would call for a determination that Johnson's statement was involuntary. These include the failure to warn Johnson of his rights, the mentality of the accused, and Johnson's physical condition at the time he gave his statement to the police. The factors which the defendant now points to could have been raised at the trial. It was incumbent upon the defendant to do so." (A. 340)

Summary of Argument

The Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission into evidence at his trial, over objection, of a confession he had given to the police.

In the totality of the circumstances, as shown on those facts which are undisputed, the confession was, as a matter of constitutional law, involuntary. The confession was taken from the defendant who was in custody, alone with the police, ignorant and injured, after incriminating lineup procedures, without any warning whatsoever of his rights and without friend or counsel. The facts show that by un-

deviating purpose the police made of the man they had charged more than eight hours earlier, an instrument for his own conviction (*infra*, at pp. 11-18).

Moreover, the Petitioner's rights under the Fourteenth Amendment were violated in that, as shown by the record, neither the Trial Judge nor the Supreme Judicial Court of Massachusetts ever made a determination of the issue of voluntariness according to the standards which have been laid down by this Court. The record below demonstrates this plainly for, among other things, the Trial Judge stated expressly that he was not certain the defendant had the right to be warned and to remain silent in these circumstances, and the Supreme Judicial Court asserted that there was no evidence of involuntariness before the Jury, ignoring substantial evidence before the Jury on factors which this Court has held relevant to voluntariness (*infra*, at pp. 18-22).

Additionally, both the Trial Judge and the Supreme Judicial Court of Massachusetts applied a rule that the confession was presumed to be voluntary when offered and that the burden of showing involuntariness was on the defendant. This rule, which is followed in only seven of the fifty states and is contrary to the rule in the federal courts, is at variance with the constitutional principles which have evolved with respect to the use of confessions, which give the citizen a right to be tried free of self-incrimination by a confession unless the confession is shown to be free and voluntary. This right is of fundamental importance and must not be vitiated by putting the burden on the defendant who, particularly in a case such as this, is at a marked disadvantage at carrying that burden in relation to the prosecution (*infra*, at pp. 23-27).

Finally, the issue of voluntariness was not submitted to the Jury. The conclusion of the Court below that this point was waived is not supported by the record or its own reasoning and, absent waiver, a defendant, as a matter of constitutional law, should not be deprived of his right to have a jury, properly instructed, pass on the issue of the voluntariness of a confession (*infra*, at pp. 28-34).

ARGUMENT

I.

On the Undisputed Facts the Confession Was Not Voluntary.

The totality of the circumstances, evidenced by undisputed facts and wholly apart from the disputed facts as to police brutality,[4] compel the conclusion that Johnson's confession was not voluntary.[5] Johnson is a Negro with barely a sixth grade education and an I.Q. of 86 (A. 23-24). He was separated from the military service under United States Marine Corps General Order #157 because of scores on "Classification Aptitude and Trade Tests" toward the bottom of the next to lowest category of test scores

[4] At the *voir dire* on the admissibility of the confession there was dispute as to police brutality leading to the confession. "Such disputes . . . are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime . . . ." *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152-153.

[5] As hereinafter appears, on the face of the record, the totality of the circumstances were not considered at any point in the proceedings below.

and far below the minimum scores then required for retention in that military service (A. 323-324).[6]

At the time he made his confession to the police Johnson had been in custody, indeed engulfed in a sea of policemen, for about eight and one-half hours, had been in numerous lineups, was injured and without sleep and subjected to frequent questioning and confrontations with witnesses. At the hearing on the Motion for New Trial no less than 32 police officers testified as to being in contact with Johnson during the course of the night and the record indicates there were many others. Police Officer Miller testified that there were many officers there that night (A. 297-298), Officer Donnelly that there were dozens of officers, the entire robbery squad was called in (A. 299), Officer Indignaro that there were 40-50 officers in the lineup room (A. 305), and Officer Glynn that there were 50-100 officers in the lineup room (A. 318). A more "police-dominated atmosphere" could scarcely be imagined. See *Miranda* v. *Arizona*, 384 U.S. 436, 445 and 456.

Between approximately midnight and the time he confessed Johnson was in four police lineups[7] (A. 326). Sev-

---

[6] Cf. *Gallegos* v. *Colorado*, 370 U.S. 49, 54, where it was said that "we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." Also cf. *Davis* v. *North Carolina*, 384 U.S. 737 (impoverished Negro with third or fourth grade education); *Townsend* v. *Sain*, 372 U.S. 293 (19 year old drug addict under possible influence of a "truth serum"); *Reck* v. *Pate*, 367 U.S. 433 (19 year old high grade mental defective, sick, hungry); *Blackburn* v. *Alabama*, 361 U.S. 199 (one hundred per cent mental incompetent probably "insane" at time of confession); *Fikes* v. *Alabama*, 352 U.S. 191 ("highly suggestible" uneducated defendant of low mentality).

[7] If either *Miranda* v. *Arizona*, *supra*, or *United States* v. *Wade*, —— U.S. —— (6/12/67), and *Gilbert* v. *California*, —— U.S. ——

eral witnesses who observed him in the lineups testified that he was bleeding on and around the head, had other cuts and scrapes on his body and that his clothing was shredded and torn (A. 28-30, 36-38, 41-46, 48-51, 60-61).

Repeatedly during the lineups (and in at least one instance outside the lineup (A. 288-289)), Johnson was confronted by Lt. John J. Donovan of the Boston Police Department with witnesses identifying him and asked if he had anything to say. At each confrontation police stenographers, who were not identified as such to Johnson, recorded the identifications, questions by Lt. Donovan and Johnson's replies (A. 288-294, 302-310, 320-321). At no such confrontation was Johnson at any time warned of his right to remain silent, that statements he made might be used against him and that he had right to counsel. These confrontations were not for the purpose of confirming identification but, without question, were intended to elicit in-

---

(6/12/67), had retroactive effect Johnson would, on the basis of these cases alone, be entitled to a new trial. This case combines all features condemned in each of those cases. It is obvious that some highly "suggestive procedures" were used in the four police lineups in which Johnson appeared since citizens identifying him noted his extensive injuries and torn-up clothing. One witness testified that although she had indicated prior to the lineup that she would identify a Negro, several of the men in the lineup were white (A. 37); another that his identification was based on Johnson's build and that no other person in the lineup had a similar build (A. 29), and another that his attention was called to Johnson because he was pushed into the lineup (A. 43-46). Indeed, Johnson was confronted by certain witnesses and as the Trial Judge found "After the last of the four lineups, he said to Lt. Donovan, in response to the latter's inquiry, that he would talk to him" (A. 329). Obviously this was a most critical step in the prosecution of Johnson, and presence of counsel was absolutely essential to combat these and any other "suggestive procedures" now lost to the record. In fact, counsel for Johnson was first assigned on October 11, 1963, some three months after he was taken into custody (A. 2).

criminating statements from Johnson[8] and lay the foundation for a confession. Moreover, it is significant that by his responses in these confrontations Johnson continued to deny his guilt at least through about 4 A.M. the time of the last such lineup.[9]

After the last lineup and in response to inquiry of Lt. Donovan who supervised the lineups and the confrontations, Johnson gave a confession to Lt. Donovan (A. 329).

Johnson's injuries, as testified to by witnesses *at trial*, were substantial. As prosecution witness Mary A. Taylor described him in the lineup which she observed at about 4 A.M., "He had tattered pants on, and he was bleeding on the head, and he was scraped and everything all over his body. . . . I think at the knee, too" (A. 37). She was asked whether the blood was flowing from his head at that time, about 4 A.M. at the last lineup, some six and one-half hours after Johnson was booked and shortly before his confession, and answered: "I think it was, I am not sure" (A. 38). Prosecution witness Maurice J. Curran who observed Johnson at a lineup around 3 A.M. was asked whether the blood which he observed on Johnson's head was flowing and responded: "I don't recall it being clotted, anyway. I won't say it was flowing, but it seemed to be fresh, as I recall, it seemed to be reasonably fresh. I can't actually say whether it was flowing or not. . . ." (A. 43).

---

[8] The law of Massachusetts is that while silence or unequivocal denial of a defendant under arrest is not admissible, an equivocal reply to an accusation is admissible. *Commonwealth* v. *Lucas*, 332 Mass. 594, 597-598 (1955).

[9] "In these circumstances [incommunicado incarceration] the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Miranda* v. *Arizona*, *supra*, at 476.

A "Report to Department of Mental Health" dated August 16, 1963 on the mental examination of Johnson, as provided under Mass. G. L. c. 123, § 100A, stated that:

> "He has headaches and dizziness when he bends down and gets up. He had a blackout spell in the police station. Things appear blurry to him. He has vomited a couple of times" (A. 20).

Upon the basis of this report mental hospital observation was recommended (A. 20). On the same day as this report, August 16, 1963, just two weeks after Johnson's confession, he underwent a right carotid arteriogram which indicated a subdural hematoma, a collection of blood between the dura and the brain (A. 169). On the following day he was operated on and found to have a subdural hematoma which the operating physician, Dr. Lawrence M. Robertson, Jr., at the *voir dire* hearing testified existed for from one to two weeks (A. 169). Dr. Robertson was not allowed to state his opinion as to the cause of the hematoma (A. 169).

At no time prior to his confession was Johnson advised of his rights to remain silent and have counsel (A. 329). The Trial Judge, on the Motion for New Trial, expressly found that he was ignorant of his rights at the time of his confession (A. 329).[10] Notice as to his right to use the

---

[10] The Trial Judge's finding that Johnson did not know his rights at the time of interrogation is confirmed by Johnson's confession where in response to a question he said: "I was up to the Savoy for a while. I picked up this girl. I don't have to give her name, do I?" See Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 981 (November, 1965): "The uncounseled suspect subjected to police questioning in a hostile atmosphere is likely to believe that there is an obligation to respond, even in the absence of coercive conduct by the police." And See *Culombe* v. *Connecticut*, 367 U.S. 568, 575 and *Miranda* v. *Arizona*, *supra*, at 467, "[W]ith-

telephone was not communicated to him as required by Massachusetts statutes (Mass. G. L. c. 278, § 33A) (A. 328). At no time prior to his confession did he consult with counsel or speak to anyone other than the police; in fact, only the police were present at the time of his confession (A. 97). The Trial Judge found that "At the time . . . (of his confession, he) had become . . . the prime suspect in the felonious homicide of Officer James B. O'Leary" (A. 329).

While the determination by this Court of the issue of voluntariness is not a matter of "color matching" from decided cases, *Reck* v. *Pate*, 367 U.S. 433, 442, the colors in decided cases have their reflection here in the limited mentality and education of the defendant, see *Ward* v. *Texas*, 316 U.S. 547, 555, *Fikes* v. *Alabama*, 352 U.S. 191, 196-197, *Davis* v. *North Carolina*, 384 U.S. 737, 742, *Clewis* v. *Texas*, —— U.S. —— (4/24/67); in the undeviating intent of the officers to obtain from the man they had already charged evidence on which to convict him, see *Spano* v. *New York*, 360 U.S. 315, 324; in the fact that the defendant was injured, see *Reck* v. *Pate*, *supra*, at 441-443, *Clewis* v. *Texas*, *supra*; in his custodial isolation, see *Watts* v. *Indiana*, 338 U.S. 49, 53, *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 67, *Clewis* v. *Texas*, *supra*; in the absence of counsel, see *Payne* v. *Arkansas*, 356 U.S. 560, 567, *Blackburn* v. *Alabama*, 361 U.S. 199, 207; and in the total failure of warning of his rights, see *Turner* v. *Pennsylvania*, *supra*, at 64, *Haynes* v. *Washington*, 373 U.S. 503, 510-511, *Davis* v. *North Carolina*, *supra*, at 740-741, *Clewis* v. *Texas*, *supra*.

---

out proper safeguards [adequate warnings and right of counsel] the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."

In addition to this accumulation of indicia of a will overborne the evidence taken as a whole plainly shows that this defendant was deliberately made the instrument of his own conviction. In the line of cases which begins with *Brown* v. *Mississippi*, 297 U.S. 278, there runs a dominant theme that in the end the issue of voluntariness comes down to the question of whether the circumstances show a contrivance to overbear the defendant's right to be silent, *Haley* v. *Ohio*, 332 U.S. 596, 607, see *Blackburn* v. *Alabama*, *supra*, at 206-207.

It is obvious that the police "interrogation [and, indeed, the confrontations with identifying witnesses which laid the foundation for the interrogation] was not intended merely to secure information," but as in *Clewis* v. *Texas*, *supra*, was "specifically designed to elicit a . . . statement." [11] Not only was Johnson's statement in response to leading questions and in question and answer form (see *Spano* v. *New York*, *supra*), but on its face it is a catalogue of admissions of the essential ingredients of each of the substantive crimes for which he was thereafter indicted (A. 191-199). In fact, the procedure of confronting him in lineups with identifying witnesses in circumstances appearing to require response from him (see *Bram* v. *United States*, 168 U.S. 532), while he was injured, not warned of his rights and ignorant of them, the prime suspect in the homicide, and in a "police-dominated atmosphere" without friend, advisers or counsellors and patently subject to the "complete authority and control" of the police (see *Bram*, *supra*,

[11] The police were "concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown this Court has held that the confession must be examined with the utmost careful scrutiny. . . ." *Spano* v. *New York*, *supra*, at 324.

at 563) can only have been for the purpose of breaking down his will to deny guilt (which it did) and of obtaining a confession. The undisputed facts evidence a situation so "inherently coercive" that in all the circumstances it cannot be said that Johnson's confession was made voluntarily.

II.

The Issue of Voluntariness Was Never Determined Below in Accordance With the Standards Laid Down by This Court.

With respect to several of the circumstances bearing on the voluntariness of Johnson's confession, the courts below plainly did not give them the weight required by this Court, or indeed did not give them any weight at all. At the *voir dire* hearing the Trial Judge determined the question of the voluntariness of Johnson's confession solely in the context of a claim of physical beating (see A. 337)[12] without consideration of his intelligence, physical condition, ignorance of and lack of warning as to his rights to remain silent, to refuse to answer questions and to communicate with counsel, or the inherently coercive nature of the situation wherein Johnson was alone amidst a veritable army of law enforcement officers (A. 189, 191-192, 325).

On the Motion for New Trial to the extent the Trial Judge considered any of these factors, he did so solely on

[12] That the Trial Judge determined the question at the *voir dire* hearing solely in the context of physical beating and on the Motion for New Trial solely on the question of the applicability of *Escobedo*, is not surprising in view of the Massachusetts rule that the confession is presumed voluntary and the burden is on the defendant to prove otherwise. See *infra*, at pp. 23-27. The Trial Judge apparently concluded (A. 189) that under this rule there was no obligation for him to consider matters other than those expressly referred to by Johnson's trial counsel in protesting voluntariness (A. 325).

the question of the applicability of *Escobedo* v. *Illinois*, 378 U.S. 478[13] and not on the question of voluntariness (A. 329-330). Clearly on the issue of voluntariness, the Trial Judge could not have considered Johnson's right to remain silent and to be cautioned by police as to his rights, since the Trial Judge's Findings, Rulings and Order show that the Trial Judge was apparently uncertain as to whether Johnson had such rights in the circumstances and in effect reserved that question to the appellate court (A. 329). These factors have taken on increasing significance. See *Miranda* v. *Arizona*, 384 U.S. 436; *Johnson* v. *New Jersey*, 384 U.S. 719, 730; *Davis* v. *North Carolina*, 384 U.S. 737, 740. See also *Clewis* v. *Texas*, —— U.S. —— (4/24/67).[14]

---

[13] See footnote 12.

[14] These factors should have great weight in this case where Johnson claims physical coercion by police and that he requested counsel. After his arrest he had no access to persons other than the police and only his word against that of many policemen. "[A]ny protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present." *United States* v. *Wade*, —— U.S. —— (6/12/67). How can Johnson, or any defendant, ever prove coercion in these circumstances; the police are not likely to testify to their own coercive acts; and in this case the automobile accident afforded obvious rationalization for Johnson's injuries, whether or not all resulted from the accident. (See dissenting opinions of Justice Douglas, *Crooker* v. *California*, 357 U.S. 433, 443-448 and Justice Black, *In re Groban*, 352 U.S. 330, 340-343.) In fact, there was testimony that, although Johnson was bleeding from the back of his head when booked at about 9:30 P.M., he had no swelling, bruises or cuts on his face at that time (A. 78, 80, 83, 86), but that later in the evening while in the lineups he had blood on the right side of his face (A. 42-43) and on his nose and mouth (A. 49-50) and his cheek was swollen (A. 50) from which it might be found that he received these added injuries while in custody. The report concerning Johnson, dated November 5, 1963, of Dr. Samuel Allen, Acting Director of Clinical Psychiatry, Massachusetts Correctional Institution, Bridgewater, to the Clerk of the Superior Court (A. 23) stated that: "He was treated at

On appeal the Massachusetts Supreme Judicial Court failed to recognize that the Trial Judge did not (and could not because he was uncertain Johnson had such rights) give the significant weight on the issue of voluntariness to absence of counsel and failure to warn of constitutional rights, now required by this Court. The Court did acknowledge that the Trial Judge's decision at the *voir dire* hearing was directed only to the question of physical coercion. It suggested, however, that Johnson somehow waived right to have these other factors considered on the issue of voluntariness, because they were not specifically raised by defense at trial.[15] But counsel objected to admission of the confession on the grounds of voluntariness and is entitled to have this issue determined, with proper weight given these factors, as that weight has been defined by this Court, even in opinions subsequent to Johnson's trial. *Rogers v. Richmond*, 365 U.S. 534. See *Johnson* v. *New Jersey, supra; Davis* v. *North Carolina, supra.*

While the opinion of the Supreme Judicial Court of Massachusetts observed that Johnson's mental capabilities and physical condition at the time of trial were known to the Trial Judge when he denied the Motion for New Trial, the Trial Judge's written decision on the Motion demonstrates that he concerned himself with the application of the *Escobedo* case—not the issue of voluntariness.

Boston City Hospital and Norfolk Prison Hospital for injuries sustained *after* his arrest." (Emphasis supplied.) In these circumstances the prosecution should have had the same heavy burden of proof on the elements of voluntariness it now has under the *Miranda* opinion with respect to waiver of right to counsel. See discussion below.

[15] See footnote 12, *supra.*

More significantly, the Supreme Judicial Court took no note of the fact that the absence of counsel and failure to warn were not considered on the issue of voluntariness by the Trial Judge—and could not have been because he was uncertain Johnson had such rights in the circumstances. Moreover, the Supreme Judicial Court did not itself consider these factors but affirmed solely on the basis of the Trial Judge's findings, stating that the "question was one of fact." Although the "basic facts on which coercion is ascertained" involve fact determinations, "the issue of coercion . . . involves the application of constitutional standards of fundamental fairness under the Fourteenth Amendment." *Thomas* v. *Arizona*, 356 U.S. 390, 393. It was incumbent upon the Supreme Judicial Court to ensure that in resolving this issue the Trial Judge take into account all relevant factors and follow the standards laid down by this Court. See *Haynes* v. *Washington*, 373 U.S. 503, 517-518.[16]

Indeed, it appears from the opinion of the Massachusetts Supreme Judicial Court that it was not aware of the significance placed by this Court on the absence of counsel and failure to warn in determining the voluntariness of a confession. Twice in its opinion that Court stated categorically that there was no evidence before the Jury on the issue of voluntariness (A. 338-339). And yet each of these factors of absence of counsel and failure to warn were in evidence before the Trial Judge and the Jury, in addition

[16] In *Reck* v. *Pate*, 367 U.S. 433, 454, Mr. Justice Clark in dissenting suggested that one of the factors underlying the result in *Turner* v. *Pennsylvania*, 338 U.S. 62, was that the Trial Judge refused to charge "that in considering the voluntariness of the confession the prolonged interrogation should be considered." At p. 65.

to certain testimony as to Johnson's injuries (A. 191-201, esp. at 201; see *infra,* at p. 32).

In short, at no point in the proceedings in the State Courts has the issue of the voluntariness of the confession been determined in the light of the standards set forth by this Court.

> "A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession . . . may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." *Rogers* v. *Richmond, supra,* at 544-545.

III.

The Rule Employed Below That the Confession Was Presumed to Be Voluntary and That the Burden Was on the Defendant to Show That the Confession Was Not Voluntarily Made Violates Due Process of Law Under the Fourteenth Amendment.

In the case at bar the opinion of the Massachusetts Supreme Judicial Court stated that "the burden was on the defendant to show that the statement was not voluntarily made." The Trial Judge determined the voluntariness of Johnson's confession under Massachusetts law and stated that "The presumption is, under the law, that a confession is voluntary, unless it is overcome by evidence which shows it is not . . . (A. 139). I am not satisfied from the evidence that it was not freely and competently given, and therefore, I rule that it is admissible" (A. 189).[17]

In *Malloy* v. *Hogan*, 378 U.S. 1, this Court "squarely held the privilege [against self-incrimination] applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. . . . [T]he reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege.

---

[17] Twenty-seven states place the burden of proof of voluntariness on the prosecution to a greater or lesser extent. Only Indiana, Iowa, Maine, Massachusetts, North Carolina, Ohio, and Oklahoma impose this burden on the defendant. See *Lyons* v. *Oklahoma*, 322 U.S. 596, 600-601 (1944). In five states the law is unclear and in the remaining states no case was found on point. For a survey of states, see Addendum to this Brief.

. . . " *Miranda* v. *Arizona*, 384 U.S. 436, 463-464.[18] While the *Malloy* opinion makes it clear that admissibility of a confession "in a state criminal prosecution is tested by the same standard applied in federal prosecutions" (referring to the *Bram* case) and it is clear that the prosecution has the burden of proving the voluntariness of a confession in federal prosecutions (see *Bram* v. *United States*, 168 U.S. 532, 549; *Wan* v. *United States*, 266 U.S. 1, 14), this Court has never held squarely that state prosecutions have this burden. In *Jackson* v. *Denno*, 378 U.S. 368, it left open this question, apparently because the New York rule there involved "put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary." Justice Black dissenting in part and concurring in part, at 405.

In a case decided in this term, *Beecher* v. *Alabama*, —— U.S. —— (10/23/67), *per curiam*, Justice Brennan, joined by the Chief Justice and Justice Douglas, was of the opinion that the federal standards set forth in *Bram* applied equally in state prosecutions, quoting *Malloy* v. *Hogan*, *supra*, as follows:

> "Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .' "

[18] "The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court." *Miranda* v. *Arizona*, *supra*, Footnote 33.

Not only does the formulation of the issue contained in *Bram* of whether the confession was "free and voluntary", necessarily imply that the burden is on the prosecution, but that very case specifically held, with abundant citation of American, English and Irish authority that the burden was on the prosecution. *Beecher* also cited among other cases *Wan* v. *United States, supra,* which similarly placed the burden. Cf. *Teham* v. *United States ex rel. Shott,* 382 U.S. 406, 415. "First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"

As pointed out in *Malloy* (at 9), the "marked shift to the federal standard in state cases" reflected a return to the view that the privilege against self-incrimination is one of the "principles of a free government" not just a rule of evidence. The state is, of course, free to regulate procedures under which its laws are carried out, including creation of presumptions and imposition of the burden of proof, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser* v. *Randall,* 357 U.S. 513, 523. See *Tot* v. *United States,* 319 U.S. 463.

There cannot be the slightest doubt that the privilege against self-incrimination is "fundamental"—one of the "principles of free government." Nor can there be the slightest doubt that where the burden of proof lies will almost certainly be decisive of the outcome on an issue such as this. As pointed out above, and by this Court in many cases, an inescapable consequence of secret inquisitions is a dispute as to police brutality leading to the confession,

with the defendant's word contradicted by that of many police officers (see *supra*, at p. 11). Undoubtedly imposition of the burden on the defendant aids the prosecution, but it subjects the defendant to hardship and oppression.[19] See *Morrison* v. *California*, 291 U.S. 82, 88-89. Where there are at stake values so transcending as the defendant's life and liberty and the privilege against self-incrimination, in fundamental fairness the "margin of error" in fact finding must be "reduced as to him [the defendant] by the process of placing on the other party the burden of producing a sufficiency of proof. . . ." *Speiser* v. *Randall*, *supra*, at 525. It is for the reason that these values are so fundamental that the *Miranda* opinion placed on the prosecution the burden of establishing the "prerequisites to the admissibility of any statement made by a defendant," *i.e.*, "The warnings required and the waiver necessary." This indeed was stated to be a heavy burden (at 475-476).[20]

---

[19] "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden [of establishing waiver of *Miranda* requirements] is rightly on its shoulders." *Miranda* v. *Arizona*, 384 U.S. 436, 475. See Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 1069-1072 (November, 1965).

[20] See also opinion of Justice Clark dissenting in three cases and concurring in the fourth in *Miranda* v. *Arizona*, *supra*, at 503: *"In the absence of warnings, the burden would be on the State to prove* that counsel was knowingly and intelligently waived or *that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary."* (Emphasis supplied.) See also cases holding that state prosecutions have the burden of proving consent to a search: *e.g. Simmons* v. *Bomar*, 349 F.2d 365 (6th Cir., 1965) *per curiam*; *Maxwell* v. *Stephens*, 348 F.2d 325, 336 (8th Cir. 1965) *cert. denied*, 382 U.S. 944, *rehearing denied*, 382 U.S. 1000; *Hubbard* v. *Tinsley*, 336 F.2d 854, 855 (10th Cir. 1964).

Moreover, there is no such rational connection between the fact that a defendant confessed and a presumption of voluntariness as would justify such a presumption or burden. See *Tot* v. *United States, supra,* at 467-468. The case at bar is a case in point. It is contrary to common experience to suppose that Johnson, who denied guilt during the eight and one-half hours of detention prior to his confession, would voluntarily confess to these crimes, for which the penalty is death, were it not for the fact that he was injured, alone in a police-dominated atmosphere and subject to the complete control of the police, without friends, advisers or counsellors, not advised as to his rights and ignorant of his rights and the consequences of a confession.

Plainly where constitutional safeguards for principles of free government are involved, the prosecution should have the burden of proving compliance with them. Consistent therewith the prosecution should have the burden of proving beyond a reasonable doubt[21] the absence of inherently coercive circumstances leading to the confession and that in the totality of the circumstances the confession was voluntary. Particularly in a case such as this, where it is plain that there was no warning, the burden should be on the prosecution, and not, as the opinion below flatly states, on the defendant.

---

[21] There seems to be little question but that the standard to be applied by the jury in determining this issue should be that of "reasonable doubt." See *infra,* at p. 30. And see *Clifton* v. *United States,* 371 F.2d 354 (D.C. Cir.) *cert. denied,* 386 U.S. 995 (1966); *U.S.* v. *Inman,* 352 F.2d 954 (4th Cir., 1965). Because we are dealing not with an ordinary ruling on evidence but with the constitutional privilege against self-incrimination the standard to be applied by the Trial Judge should also be that of "reasonable doubt". See *Clifton* v. *United States, supra,* concurring opinion of Circuit Judge Leventhal, at 360. See also *Bram* v. *United States, supra,* at 549 and 565; *Harrold* v. *Territory of Oklahoma,* 169 Fed. 47, 53-54 (8th Cir., 1909).

IV.

The Failure of the Trial Court to Submit to the Jury the Issue of the Voluntariness of the Confession Violates Due Process of Law Under the Fourteenth Amendment.

The Trial Judge failed to follow the Massachusetts procedure of submitting to the Jury the issue of the voluntariness of Petitioner's confession, after having resolved this issue against Petitioner. No instruction at all was given on the issue of voluntariness (A. 207-239).

> ". . . I would be far more troubled about constitutionality should either a State or Federal Government declare that a jury in trying a defendant charged with crime is compelled to accept without question a trial court's factual finding that a confession was voluntarily given. Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest. . . . Yet, of course, the jury passing on guilt or innocence must, under any fair system of criminal procedure, be allowed to consider and decide whether an offered confession is voluntary in order to pass on its credibility." *Jackson* v. *Denno*, 378 U.S. 368, Justice Black dissenting in part and concurring in part, at 401 and 404.

At the very least, a jury should be instructed to consider, on the confession's weight or credibility, the factors which

this Court has held are relevant to its voluntariness.[22] That nothing less will satisfy concepts of fundamental fairness under the Due Process Clause is abundantly clear from the effect of the failure to instruct in this case. The Trial Judge, having heard disputed testimony at the *voir dire,* found that Petitioner failed to sustain the burden of proving the confession to have been involuntary. The Jury received the confession without any instruction to consider the numerous facts before them bearing on voluntariness (see *infra,* at p. 32) in determining either voluntariness or credibility. Thus, the confession, which was a catalogue of admissions of the essential ingredients of each crime charged, had before the Jury a degree of conclusiveness exceeding even that which the Trial Judge might have given it had he been the trier of facts of guilt. For he, at least, would have weighed in the balance the facts suggesting it was involuntary. But without instruction the Jury could not do so, and Petitioner became the instrument for furnishing against himself proof of guilt with an artificial conclusiveness.

Surely this was not a "fair system of criminal procedure" and does not comport with concepts of fundamental fairness. This Court has recently held in *Sims* v. *Georgia,* —— U.S. —— (1/23/67), that the constitutional rule on determination of voluntariness "allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant. . . ." Obviously the rule can be effectuated only if the Trial Judge instructs on this vital issue. "*Jackson* v. *Denno,*

[22] Questions of credibility are for the jury (*Jackson* v. *Denno, supra,* at Footnotes 12 and 13); but that case does not make it clear that such an instruction is constitutionally required.

means that the judge and jury must each make an independent judgment of voluntariness of an admission, the judge for purposes of admissibility and the jury for evidentiary acceptability, credibility, and weight," *Pinto* v. *Pierce*, —— U.S. —— (10/23/67), *per curiam*, Justice Fortas concurring.

Some instruction on voluntariness was essential. The Petitioner urges that a jury must be instructed not to consider the confession in their deliberations on guilt if they are not convinced beyond a reasonable doubt that it was voluntary. *Stevenson* v. *Boles*, 331 F.2d 939 (4th Cir., 1964), *affirmed per curiam*, 379 U.S. 43; *United States* v. *Inman*, 352 F.2d 954 (4th Cir., 1965); *Clifton* v. *United States*, 371 F.2d 354 (D.C. Cir.) *cert. denied*, 386 U.S. 995 (1966). (See footnote 20, *supra*, for "reasonable doubt" standard.) An instruction merely to consider voluntariness on the weight to be given a confession (unless it specifies that they are to give it no weight at all if they are not convinced it was voluntary) would not suffice because it would allow the jury to use a confession which they believe to be true even though they are not convinced it was voluntary. The privilege against self-incrimination involves values so fundamental that a jury should not be permitted to use a confession to any extent where they have any reasonable doubt as to its voluntariness.[23]

Such an instruction is essential not only because of the transcending value of the privilege against self-

[23] This is so notwithstanding that under *Jackson* v. *Denno*, the Trial Judge, in order to present a clear decision on the issue free from considerations of innocence or guilt, has already passed on admissibility. In effect, we urge the Massachusetts Rule. See Appendices in *Jackson* v. *Denno*, *supra*, for rule followed in various jurisdictions.

incrimination but because both the United States Constitution and the Constitution of Massachusetts (Article XII)[24] "establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties." *Jackson* v. *Denno, supra,* Justice Black dissenting in part and concurring in part, at 405. "The jury is the traditional and preferred arbiter of facts." *Pinto* v. *Pierce, supra,* Justice Fortas concurring. The jury's role in determination of this vital issue should not be diluted (or, indeed, as in the case at bar eliminated altogether) by the independent determination which *Jackson* requires of the judge; *Jackson* v. *Denno* does not stand for such a proposition.[25]

The opinion below assigns two reasons why the Trial Judge was not required to follow the customary Massa-

---

[24] "[N]o subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment . . . without trial by jury." Constitution of Massachusetts, Article XII.

[25] Moreover, the Jury should consider the issue with the burden of proof of showing voluntariness on the prosecution. The importance of this is demonstrated by the Massachusetts rule that: "When a defendant in a criminal case voluntarily takes the stand he waives his privilege against self-incrimination to the extent that he renders himself liable to cross-examination on all facts relevant and material to the crime with which he is charged." *Jones* v. *Commonwealth,* 327 Mass. 491, 493 (1951). The combination of the Massachusetts rule on burden of proof and the severe consequences of taking the stand on the voluntariness issue, places a double burden on the defendant (even in the case at bar while evidence on voluntariness was before the Jury through one or another circumstance, including fortunate cross-examination [see *infra,* at p. 32], they did not hear the defendant). One can easily imagine a case where the only evidence to carry a defendant's burden would come if the defendant were to take the stand on voluntariness and in these circumstances the privilege against self-incrimination would be hollow indeed and the defendant's right to have a jury pass on the issue might be, as a practical matter, meaningless.

chusetts procedure in this case. First, it states twice that there was no evidence before the Jury on the issue of voluntariness. But this is plainly contradicted by the record. Quite apart from the evidence introduced by the defendant Johnson at the *voir dire* hearing which was not presented to the Jury, there was before the Jury sufficient evidence for it to find that Johnson's statement was not made voluntarily. The Jury heard testimony that the statement was made while Johnson was in custody and in the presence of four police officers (A. 191) at Boston Police Headquarters at 5:50 A.M. in the morning (A. 201), some eight and one-half hours after Johnson was taken into custody (A. 79). The evidence indicated that Johnson had been in police lineups many times during this period of detention, that he obviously had little or no sleep, was bleeding during much of the period of detention from various cuts and scrapes and had bruises on his head and other parts of his body (A. 28-30, 36-38, 41-46, 48-51, 60-61). The Jury could find that, although Johnson was bleeding from the back of his head when booked at about 9:30 P.M., he had no swelling, bruises or cuts on his face at that time (A. 78. 80, 83, 86) but that later in the evening while in the lineups he had blood on the right side of his face (A. 42-43) and on his nose and mouth (A. 49-50) and his cheek was swollen (A. 50) from which the Jury might deduce that he received these added injuries while in custody. It appeared from the evidence before the Jury with respect to the taking of the confession that Johnson was not warned of his right to remain silent and that his answers might be used against him nor was he informed of his right to counsel (A. 191-201 esp. at 201). All this evidence was before the Jury and was relevant to the issue of the voluntariness of Johnson's statement.

Secondly, the opinion holds that Petitioner's conduct of his case "indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury" [26] (A. 339). The opinion arrives at this conclusion because Petitioner's trial counsel failed to refer to the issue in his argument to the Jury and to take exception to the Trial Judge's charge. The opinion reasons that counsel must have made this decision first because there was no evidence before the Jury on this issue and second because the "alternative was to revive and emphasize the issue by having the judge instruct the jury that, having heard the evidence on the *voir dire*, he had determined that the statement was voluntarily made. . . ."

It has already been pointed out above that there was ample evidence before the Jury on the issue of voluntariness. To the extent the opinion rests its implied waiver on this conclusion, it is obviously in error. Moreover, prior to this case there appears to be no Massachusetts case holding that the judge must instruct the jury as to his own conclusion on voluntariness (see *United States* v. *Inman*, 352 F.2d 954 (4th Cir., 1965)); none of the cases cited in the Supreme Judicial Court's opinion stand for that proposition. To the extent waiver is implied from this assumption as to trial counsel's state of mind, it is unwarranted.

---

[26] If the burden of proof is truly on Petitioner and there was no evidence before the Jury on the issue of voluntariness, as held by the Supreme Judicial Court, there should have been no necessity for it to discuss whether trial counsel impliedly waived this issue—the short answer would be that he would not have been entitled to an instruction on this issue had he requested it. The very fact that the opinion discusses, and relies on, waiver suggests the difficulties inherent in the holdings on burden of proof and the state of the evidence before the Jury.

If this is, in fact, the Massachusetts rule it places a further heavy burden on the defendant.

As indicated, neither of the assumptions upon which the Court's implied waiver is founded, are justified on the record or the state of the law of Massachusetts. Nor should the Court imply waiver of a constitutional right merely from the failure of Petitioner's trial counsel to call the omission from the charge to the attention of the Trial Judge (trial counsel made objection and took exceptions at the time the confession was admitted into evidence). As was stated in *Miranda* v. *Arizona, supra,* the prosecution should have a "heavy burden" in proving waiver of a constitutional right. The "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst,* 304 U.S. 458, 464. "Presuming waiver from a silent record is impermissible." *Carnley* v. *Cochran,* 369 U.S. 506, 516.

Conclusion

The Petitioner respectfully prays that the judgment of the Superior Court, on each indictment, as affirmed by the Supreme Judicial Court of Massachusetts, be set aside.

> "But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection,

> of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." *Payne* v. *Arkansas*, 356 U.S. 560, 568.

See also *Spano* v. *New York*, 360 U.S. 315, 324; *Lynum* v. *Illinois*, 372 U.S. 528, 537-538; *Jackson* v. *Denno*, 378 U.S. 368, 376 (1964).

Moreover, even if this Court should not determine that on undisputed facts the confession was involuntary as a matter of due process, a determination by this Court that there was error in the procedures employed below with respect to the confession, should preclude its use at a new trial by reason of the requirements set forth in *Miranda* v. *Arizona*, 384 U.S. 436. The administrative inconvenience of applying the *Miranda* rules to a new trial is minimal and is not of the kind to which the prospectivity rule in *Johnson* v. *New Jersey*, 384 U.S. 719, was directed. See *State* v. *Brock*, 100 Ariz. 168, 416 P.2d 601 (1966), *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P.2d 177 (1967), *People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P.2d 600 (1967) (Traynor, *C.J.*), *State* v. *Ruiz*, 49 Haw. 504, 421 P.2d 305 (1966), *Creech* v. *Commonwealth*, 412 S.W.2d 245 (Ky. 1967), *State* v. *Shoffner*, 31 Wis.2d 412, 143 N.W.2d 458 (1966), *United States* v. *Pinto*, 259 F.Supp. 729 (D. N.J. 1966), *aff'd per curiam*, 374 F.2d 472 (3rd Cir. 1967), *Gibson* v. *United States*, 363 F.2d 146 (5th Cir. 1966). *Compare*, *Jenkins* v. *State*, 230 A.2d 262 (Del. 1967), *State* v. *Worley*, 227 N.E.2d 746 (Ill. 1967), *State* v. *Vigliano*, 50 N.J. 51, 232 A.2d 129 (1967), *People* v. *LaBelle*, 53 Misc.2d 111, 277 N.Y.S.2d 847 (Co. Ct. 1967).

The defendant prays that it be ordered that he be given a new trial, at which the statement given to Lieutenant Donovan may not be used.

Respectfully submitted,

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel

ADDENDUM

Survey of State Law as to Who Has the Burden of Proof on the Voluntariness of a Confession

I. Twenty-seven States Place the Burden on the Prosecution

Fourteen states place the burden on the prosecution, but do not indicate how much evidence is needed to satisfy that burden.

Arkansas

Payne v. *State*, 231 Ark. 727, 332 S.W.2d 233 (1960).

Kansas

State v. *McCarther*, 197 Kan. 279, 416 P.2d 290 (1966).

Maryland

Mercer v. *State*, 237 Md. 479, 206 A.2d 797 (1965).

Michigan

People v. *Boyce*, 314 Mich. 608, 23 N.W.2d 99 (1946).

Missouri

State v. *Joyner*, 382 S.W.2d 683 (Mo. 1964).

Nebraska

Parker v. *State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

New Jersey

State v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964).

New Mexico

State v. *Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

OREGON

State v. *Schwensen*, 237 Ore. 506, 392 P.2d 328 (1964).

SOUTH CAROLINA

State v. *Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966).

SOUTH DAKOTA

State v. *Hinz*, 78 S.D. 442, 103 N.W.2d 656 (1960).

TEXAS

Hanus v. *State*, 104 Tex. Crim. 543, 286 S.W. 218 (1926).

WEST VIRGINIA

State v. *Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962).

WISCONSIN

State v. *Bronston*, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

Three states require that the prosecution prove a confession voluntary beyond a reasonable doubt.

LOUISIANA

State v. *Carter*, 248 La. 730, 181 So.2d 763 (1965).

MISSISSIPPI

Lee v. *State*, 236 Miss. 716, 112 So.2d 254 (1959).

NEW YORK

People v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

Four states place the burden on the state but indicate that the burden is less than proof beyond a reasonable doubt.

ALABAMA

Lokos v. *State*, 278 Ala. 586, 179 So.2d 714 (1965).
Minirth v. *State*, 40 Ala. App. 527, 117 So.2d 355, *cert. denied*, 117 So.2d 360 (Ct. App. 1959) (substantial evidence of validity).

HAWAII

State v. *Foster*, 44 Haw. 403, 354 P.2d 960 (1960) (scintilla of evidence of voluntariness).

UTAH

State v. *Crank*, 105 Utah 332, 142 P.2d 178 (1943) (preponderance of the evidence).

VIRGINIA

McCoy v. *Commonwealth*, 206 Va. 470, 144 S.E.2d 303 (1965) (credible evidence).

Six states require that the prosecution lay a *prima facie* case before the confession can be admitted.

ARIZONA

State v. *Preis*, 89 Ariz. 336, 362 P.2d 660 (1961).

CALIFORNIA

Lisenba v. *California*, 314 U.S. 219, 234 (1941).
People v. *Robinson*, 61 Cal.2d 373, 38 Cal. Rptr. 890, 392 P.2d 970 (1964).

CONNECTICUT

State v. *Lorain*, 141 Conn. 694, 109 A.2d 504 (1954).

FLORIDA

Reddish v. *State*, 167 So.2d 858 (Fla. 1964).

GEORGIA

McLemore v. *State*, 181 Ga. 462, 182 S.E. 618 (1935).
Reliford v. *State*, 101 Ga. App. 244, 113 S.E.2d 473 (1960).

ILLINOIS

People v. *Wright*, 24 Ill.2d 88, 180 N.E.2d 689 (1962).

II. FIVE STATES ARE NOT CLEAR AS TO WHO HAS THE BURDEN

DELAWARE

A Delaware case indicates that it is the practice for the state to go forward with evidence to show that a confession was made voluntarily, but that it has never been decided as a matter of law who has the burden of proof. *Wilson* v. *State*, 49 Del. 37, 109 A.2d 381 (1954).

Two states indicate that before a confession may be admitted in evidence it must be shown to be voluntary; however, the cases do not state who has the burden of proof on this issue.

COLORADO

Castro v. *People*, 140 Colo. 493, 346 P.2d 1020 (1959).

PENNSYLVANIA

Commonwealth v. *Orezak*, 328 Pa. 65, 195 Atl. 45 (1937).
Commonwealth v. *Carluccetti*, 369 Pa. 190, 85 A.2d 391 (1952).

KENTUCKY

A Kentucky case which has never been overruled places the burden quite clearly on the defendant. See *Thompson* v. *Commonwealth*, 261 Ky. 356, 87 S.W.2d 968 (1935). This case, however, has never been cited for that proposition

again. A more recent case states that if a confession is shown to be voluntary it will be admitted in evidence, but there is no indication of who has the burden of proof on the issue. See *Commonwealth* v. *Mayhew*, 297 Ky. 172, 178 S.W. 2d 928 (1943).

TENNESSEE

In Tennessee the law is quite clear that where one confession has been declared involuntary, the state has the burden of proving a subsequent confession was not also involuntary. No cases were found which indicated who has the burden for the first confession. See *Williams* v. *State*, 186 Tenn. 568, 212 S.W.2d 383 (1948).

III. SEVEN STATES PLACE THE BURDEN ON THE DEFENDANT

Seven states place the burden on the defendant to prove that a confession was not voluntary.

INDIANA

Britt v. *State*, 242 Ind. 548, 180 N.E.2d 235 (1962).

IOWA

State v. *Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962).

MAINE

State v. *Merrow*, 161 Me. 111, 208 A.2d 659 (1965).

MASSACHUSETTS

Commonwealth v. *Johnson*, 225 N.E.2d 360 (Mass. 1967).

NORTH CAROLINA

State v. *Litteral*, 227 N.C. 527, 43 S.E.2d 84 (1947).

OHIO

City of Columbus v. *Bostey*, 136 N.E.2d 426 (Ohio Ct. App. 1954).

OKLAHOMA

Petition of Pate, 371 P.2d 500 (Okla. Crim. App. 1962).

IV. ELEVEN STATES DO NOT APPEAR TO HAVE DECIDED THE QUESTION

No case was found on the subject in the following eleven states: Alaska, Idaho, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, Vermont, Washington and Wyoming.